SUPREME COURT, U. S.
FILED
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IN THE

Supreme Court of the United States

October Term, 1971.

No. 71-1454

DOLORES BRENNAN and
ANNE E. LONERMAN and
WILLIAM JONES,

Petitioners,

v.

GEORGE R. HAINES, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. ———.

DOLORES BRENNAN AND ANNE E. LONERMAN AND WILLIAM JONES,

Petitioners,

v.

GEORGE R. HAINES, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Dolores R. Brennan, Anne E. Lonerman and William Jones pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above entitled case on February 11, 1972. The Trial Judge did not render a written opinion. The opinion of the Chief Judge of the Third Judicial Circuit Declining to Convene a Three Judge Court, is unreported and is printed in Appendix page 1. The order of the Trial Judge dismissing plaintiffs' complaint is printed in Appendix page 2. The opinion of the Court of Appeals affirming the order of the District Court is unreported and is printed in Appendix page 3, and the Judgment of the Court of Appeals is printed in Appendix page 8.

JURISDICTION.

The Judgment of the Court of Appeals affirming the order of the District Court, was entered February 11, 1972. Jurisdiction of this Court is invoked under 28 U. S. C. 1254[1].

QUESTIONS PRESENTED.

1. Did the Court of Appeals Err in Failing to Convene a Three Judge Court Pursuant to 28 U. S. C. 2281.

2. Did the Court of Appeals Err in Not Deciding This Case on the Merits.

3. Did the Court of Appeals Err in Not Finding the provision of the First Class Township Code of Pennsylvania With Respect to Filling Vacancies on a Township Board of Commissioners Violative of the Fifth and Fourteenth Amendments to the Federal Constitution.

STATUTORY PROVISIONS INVOLVED.

The statutory provisions involved are the Equal Protection Clause of the Fifth and Fourteenths Amendments of the United States Constitution, the Three-Judge Court Act, 28 U. S. C. 2281 et seq., and the Act of April 27, 1967, P. L. 9, Sec. 1 (53 P. S. 55530). The text of the Three-Judge Court Act and the Act of April 27, 1967 are set forth in full in Appendix page 9 and 10.

STATEMENT OF THE CASE.

Abington Township is a township of the First Class, organized under the laws of Pennsylvania. The Township is governed by a Board of Fifteen Commissioners in accordance with the provisions of the First Class Township Code, Act of June 24, 1931, P. L. 1206 Sec. 504, as amended, 53 P. S. Sec. 55504. Each commissioner is elected from one of the fifteen wards in the Township by the voters of his ward only. In the municipal elections of 1969, Hugh A. O'Neill was elected commissioner from the Eighth Ward for a four year term. On June 11, 1970, six months after his election, Hugh A. O'Neill resigned his office effective as of June 30, 1970.

The provision of the Pennsylvania Township Code with respect to filling vacancies on Township Boards of Commissioners provides:

Act of April 27, 1967, P. L. No. 9, § 1 (53 P. S. § 55530)

> "When a vacancy occurs in the office of township commissioner in any township, by reason of death, resignation, removal from the township or ward, or otherwise, the board of township commissioners of such township shall fill such vacancy by appointing by resolution a registered voter of the ward or township, as the case may be in which the vacancy occurs. If the board of township commissioners of any township shall refuse, fail, or neglect, or be unable for any reason whatsoever, to fill such vacancy within thirty days (30) after the vacancy occurs, then the Court of Quarter Sessions shall upon the petition of twenty registered voters of the ward or township, as the case may be, in which the vacancy occurs appoint a registered voter of the township to fill the vacancy. In either event, the person so appointed shall have been a resi-

dent of the township continuously for at least one (1) year before his appointment and shall hold office for the unexpired term of the person whose place he is appointed to fill. In townships divided into wards, a commissioner appointed by either the Board of Commissioners or the Court of Quarter Sessions shall reside in the ward in which the vacancy occurred and shall have resided in said ward continuously for at least one (1) year before his appointment."

In accordance with this statute, on July 27, 1970, the fourteen remaining Commissioners none of whom had been elected by the voters of the Eighth Ward appointed Brynmor Davis, Jr. to serve as Commissioner of the Eighth Ward and fill the unexpired term vacated by Mr. O'Neill. The unexpired term was then approximately three and one half years.

Petitioners are citizens of the United States and of the Commonwealth of Pennsylvania and each resides and is registered to vote in the Eighth Ward of Abington Township. Respondents are the Fourteen Commissioners of Abington Township who voted on the appointment of Davis; Davis—presently serving as Commissioner of the Eighth Ward; plus the Treasurer of Abington Township and the County Board of Elections of Montgomery County.

Petitioners brought this action pursuant to the provisions of 42 U. S. C. 1983, alleging that the appointment of respondent, Davis, by respondent Commissioners to represent petitioners on the Board of Commissioners of Abington Township is violative of the rights guaranteed to petitioners by the Fifth and Fourteenth Amendments of the United States Constitution. Accordingly, petitioners requested: that Davis be temporarily enjoined from participating in the Office of Township Commissioner; that

respondent Township Treasurer be enjoined from dispensing public monies to Davis; that the statute by which Davis was appointed be declared violative of the Constitution of the United States; and that the office of Township Commissioner for the Eighth Ward be declared vacant and a special election be ordered.

Subsequent to filing their complaint, petitioners moved for the convening of a Three-Judge Court pursuant to the provisions of 28 U. S. C. 2281 et seq. The District Court then made recommendation to the Chief Judge, who on April 5, 1971 declined to convene a Three-Judge Court. In light of the order of the Chief Judge declining to convene a Three-Judge Court and thereby removing jurisdiction to grant the relief requested, the District Court dismissed the Complaint on April 28, 1971. On February 11, 1972 the Court of Appeals, in a Per Curiam opinion affirmed the Order of the District Court.

REASONS FOR GRANTING THE WRIT.

1. The Court of Appeals Erred in Failing to Convene a Three-Judge Court.

Petitioners have requested that this matter be heard by a Three-Judge Court as required by 28 U. S. C. § 2281 et seq., since only a District Court composed of three judges has the power to enjoin the enforcement of a state statute by a state officer on grounds of unconstitutionality. The Order of the District Court dismissing the Complaint was entered on the basis that it alone did not have the power to grant the relief requested in the complaint.

There are three requirements which must be met before a three-judge court can be convened. Two are imposed by federal statute—the challenge must be to the constitutionality of a state statute, and the enforcement or operation of that statute must be by a state officer. The respondents have acknowledged that each of these requirements exist.

The third requirement for empaneling a three-judge court is that the Complaint must present, at least formally, a constitutional question which is not on its face without merit, and such a question must be "not unsubstantial". This Court has defined an "unsubstantial question" as one which is either "obviously without merit" or one which has had its unsoundness demonstrated by previous decisions of the Supreme Court. *Ex Parte Poresky*, 290 U. S. 30, 32 (1933).

In the Court of Appeals, petitioners argued that this case presents a substantial constitutional question because the statute that was complied with when Brynmor Davis, Jr. was appointed gave the voters of the Eighth Ward no part in the selection of their representative, or of the persons who selected their representative. The voters in the other fourteen wards elected the Commissioners who in

turn voted for the appointment of Davis. In its opinion the Court of Appeals stated, "that this procedure acts to deny the citizens of the ward faced with a vacancy any role in the selection of a replacement." (Appendix page 5). The Court of Appeals also stated that "[t]he new commissioner is the choice solely of those Commissioners remaining on the board when the vacancy is filled" and "[n]one of these individuals was elected by the vote of the electorate of the ward where the vacancy exists" (Appendix page 5). Although the Court of Appeals acknowledged that a "potential for unfairness" exists in this situation, it concluded that it does not pose a substantial constitutional question.

Petitioners pointed out in their Brief to the Court of Appeals that this case differs markedly from those instances where a governor or president makes an appointment to fill a vacancy since in those instances *all voters* have a choice in electing the appointing official, whereas in the instant case the voters of the Eighth Ward had no choice in electing the appointing Commissioner. However, in its opinion, the Court of Appeals ignored this distinction. The Court cited *Kaelin v. Warden*, 334 F. Supp. 602 (E. D. Pa. 1971) for the proposition that the use of the appointive process to fill a vacancy is not foreign to traditional notions of representative government and that the appointive procedure is specifically condoned by the Seventeenth Amendment in order to fill vacancies in the United States Senate. Petitioners agree that the appointive procedure as provided by the Seventeenth Amendment for temporary appointments is not violative of traditional notions of representative government because under the Seventeenth Amendment the "appointing official" is the states governor whom *all* voters have a part in electing. If, however, the Amendment provided that a vacancy in the Senate was to be temporarily filled by majority appointment of the Senators of all states

except that in which the vacancy occurred, we would have a factual situation analogous to the instant case.

Petitioners assert that the statutory scheme for filling vacancies in the Office of Township Commissioner is inherently offensive to the Federal Constitution. Although there is no constitutional requirement that local officials be popularly elected, it is clear that once the legislature decides to permit popular election it is absolutely bound to conduct such elections in strict conformity with the Federal Constitution. *Avery v. Midland County, Texas,* 390 U. S. 474 (1968).

The Third Circuit Court of Appeals discussed, in its opinion, the recent case of *Kaelin v. Warden,* 334 F. Supp. 598 (E. D. Pa. 1971). There, a three-judge court was empanelled to consider the constitutionality of the Pennsylvania Third Class County Statute, 16 P. S. 501[b], for filling vacancies on a County Board of Commissioners.

Although the case at bar differs from *Kaelin* in that here the First Class Township Code is under attack, petitioners fail to see why a three-judge court was required in *Kaelin* and not in the instant case, especially in light of the Court of Appeals statement that the situation *although unfair* does not reach federal constitutional proportions. If anything, the system which is under attack in the case at bar presents a more substantial constitutional question than *Kaelin* because under the Third Class County Code, considered in *Kaelin,* the appointment is made by the Judges of the Court of Common Pleas who are elected by the voters at large, whereas under the First Class Township Code the voters of the ward faced with a vacancy have no voice, direct or indirect, in the election of appointing official.

Under the test as set forth in *Poresky, supra,* the question to be asked in determining "substantiality" is whether the question is "not on its face without merit". In the following cases the District Court held this to be the case and,

therefore, empanelled a three-judge court as required by Secs. 2281, et seq.

In *Hyden v. Baker,* 286 F. Supp. 475 (M. D. Tenn. 1968), it was held that the question of whether the equal representation requirements of *Reynolds v. Sims,* 377 U. S. 533 (1964) applied to the Quarterly Courts of Tennessee Counties was such an issue. In *Kramer v. Union Free School District No. 15,* 379 F. 2d 491 (2d Cir. 1967), the question of whether participation in elections for school boards could be constitutionally limited to persons who owned or leased real estate or had children enrolled in the schools, was held to be substantial. In *Goldman v. Knecht,* 295 F. Supp. 897 (D. C. Colo. 1969), the same result was reached concerning a challenge to the Colorado Vagrancy Law.

In the overwhelming majority of cases when an aspect of "voting rights" was involved, the District Court has seen fit to empanel a three-judge court due to the substantiality of the constitutional question—because a case involving the Equal Protection Clause and the right to vote is "not obviously without merit". In *Buchanan v. Rhodes,* 400 F. 2d 882 (6th Cir. 1968), Cert. denied 393 U. S. 1062, the District Courts refusal to empanel a three-judge court was reversed on grounds that the constitutionality of the Ohio statute providing for election and assignment of judges requires the convening of a three-judge court. In *Gong v. Kirk,* 375 F. 2d 729 (5th Cir. 1967) the Fifth Circuit Court of Appeals held that only a three-judge court can consider the constitutionality of the Florida Apportionment Plan. In *Haakenson v. Parkhouse,* 312 F. Supp. 929 (E. D. Pa. 1970), a three-judge court was empanelled to decide the constitutionality of a state statute regulating absentee ballot. In *Ramarick v. Johansen,* 310 F. Supp. 61 (D. C. Minn. 1970) a three-judge court decided the valid-

ity of a state statute dealing with home rule charter amendments. And, as noted above, in *Kaelin v. Warden, supra,* a three-judge court was empanelled to consider the constitutionality of a state statute which provided procedures for filling vacancies in a Third Class County Board of Commissioners.

From the foregoing, it seems clear that this case presents, at the very least, a constitutional question which is not on its face without merit, and therefore, the Court of Appeals erred in failing to reverse the District Court and order the matter heard before a three-judge court.

2. The Court of Appeals Erred in Not Deciding This Case on the Merits.

In its opinion, the District Court did not address itself to petitioners request that this case be heard on the merits. In support of their request for injunctive relief, petitioners have averred, in their Complaint, that defendant Davis, sitting as a member of the Abington Township Board of Commissioners, is enacting and will help to enact in the future, ordinances and resolutions concerning such matters as taxes, zoning regulations, traffic regulations, health and welfare regulations and other regulations which will affect and be binding upon petitioners. On November 13, 1970 this action was initiated, and by the time this Court considers this petition, Davis may have been sitting for almost two years. During this time Davis will have been representing the interests of the residents of the Eighth Ward and committing what petitioners urge to be irreparable harm. Assuming that this Court grants the instant petition several more months may pass before a hearing and argument before this Court. If at that time this Court limits itself to the issue of whether or not a three-judge court should be empanelled, there is a high likelihood that this

case will be mooted. The term of the office occupied by respondent Davis expires in November of 1973 when the next local elections are held. If this Court grants the petition, hears the case, and remands with an order to empanel a three-judge court, by the time of hearing and decision by the three-judge court, the next election day will almost surely have arrived.

Since its inception in 1910, the Three Judge Court Act has gone through a long and troubled history. Both courts and commentators alike have pondered the question of which cases are properly presented to a three-judge court, and where appeals lie from decisions refusing to convene such a Court. See, e.g. *Currie, Appellate Review of the Decision Whether or Not to Empanel a Three-Judge Court,* 37 U. CHI. L. REV. 159 (1969) wherein the author stated at page 165: "some day a new statute may show which orders in three-judge cases are reviewable in which courts". One Court has attempted to explain the reason for this confusion:

> "The confusion is inherent in the 3 judge statutes and their *application to present day problems* . . . Any such confusion is especially apparent concerning appeals from a 1 judge and/or 3 judge order." *Mayhue's Super Liquor Store, Inc. v. Meiklejohn,* 426 F. 2d 142, 146 (1970) (emphasis added).

Although it is clear that petitioners have taken the proper procedural steps in advancing this litigation, *Schackman v. Arnebergh,* 387 U. S. 427 (1967), the foregoing discussion amply illustrates the administrative inefficiency and judicial delays inherent in the system. Cf. *Jackson v. Choate,* 404 F. 2d 910 (5th Cir. 1968). Unless this court accepts jurisdiction to determine this controversy on the merits, the practical result is that petitioners case will be mooted.

3. The Provision of the First Class Township Code With Respect to Filling Vacancies on a Township Board of Commissioners Is Violative of the Fifth and Fourteenth Amendments to the Federal Constitution.

The pleadings in this case demonstrate that there is no factual dispute—the only question being a legal determination as to whether this set of facts constitutes a denial of equal protection of the law. Although respondents deny that each Commissioner represents the voters in the ward in which he resides, they acknowledge that each Commissioner is elected solely from one ward.

Beginning with *Baker v. Carr*, 369 U. S. 186 (1962) and continuing with *Reynolds v. Sims*, 377 U. S. 533 (1964) and *Avery v. Midland County, Texas*, 390 U. S. 474 (1962) this Court has developed a considerable body of case law concerning the problems of dilution of votes by malapportionment, consistently insisting on a one-man one-vote apportionment, first for state offices and finally in *Avery* for local and county offices. Rather than a diluted vote, the instant case presents a situation where the right to vote is not only taken away from a class of persons, i.e. the voters of the Eighth Ward, but is actually given indirectly to another class of voters i.e., the voters of all the other wards through the remaining Commissioners.

The one-man, one-vote rule can not be looked at in a vacuum for it is said to apply to correct any situation where inequality of voting strength exists. In declaring the Illinois system for selecting presidential voters invalid, this Court has defined the breadth of the equal protection clause as it applies to the vote:

> "The idea that one group can be granted greater voting strength than another is hostile to the one-man, one-vote basis of our representative government." *Moore v. Ogilive*, 394 U. S. 814, 819 (1969).

Moreover, once the franchise is extended to a class of voters, e.g. the voters of the Eighth Ward, the Fourteenth Amendment commands equal protection in the exercise of that franchise.

> "(O)nce the class of voters is chosen and their qualifications specified, we see no constitutional way by which equality of voting may be evaded." *Gray v. Sanders*, 372 U. S. 368 (1963).

The statute presently under consideration clearly takes away from a group of voters the right to select a representative of their choice. It is for this reason that the provision for filling vacancies under the First Class Township Code is violative of the Fourteenth Amendment to the Federal Constitution.

CONCLUSION.

The foregoing discussion clearly demonstrates that the Act of April 27, 1967, P. L. 9 Sec. 1 (53 P. S., 55530) as applied to this case not only raises a substantial constitutional question but also it presents an obvious violation of the Fourteenth Amendment to the Federal Constitution. Since the case may become moot if the Writ is granted only on the question of the propriety of empanelling a Three-Judge Court, it is submitted that this Court should grant the Writ for the purpose of a full hearing on the merits.

Wherefore, petitioners pray that this Petition for a Writ of Certiorari be granted.

MITCHELL A. KRAMER,
Counsel for Petitioners.

Of Counsel:
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Appendix.

DECLINATION TO CONVENE A THREE JUDGE COURT.

Having considered the request of Honorable John B. Hannum, United States District Judge, before whom this case is pending, that I convene a Three Judge Court to hear and decide this controversy, and having considered the complaint herein, I conclude that the plaintiffs' formal challenge to the constitutionality of a state statute is not such as to warrant the convening of a Three Judge Court. Accordingly, I decline to convene such a court.

WILLIAM H. HASTIE
Chief Judge
Third Judicial Circuit

Dated: April 5, 1971.

ORDER.

AND NOW, this 28th day of April, 1971, in light of the Order of Chief Judge Hastie declining to convene a three judge court and thereby removing jurisdiction from this court to grant the relief requested by the plaintiffs, it is hereby ORDERED that plaintiffs' Complaint be DISMISSED WITH PREJUDICE.

J. L. B. HANNUM, *J.*

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

Nos. 71-1503 through 71-1505.

DOLORES BRENNAN, ANNE E. LONERMAN AND WILLIAM JONES

v.

GEORGE R. HAINES, MAX M. SOLOMON, EDWARD M. REILLY, GEORGE F. SHUSTER, WILLIAM D. C. DENNIS, DENNIS P. DOUGHERTY, RUSSELL S. DETWEILLER, FRED W. GENTNER, RICHARD Z. KINARD, HORACE F. RICHTER, JR., BERNARD J. ENRIGHT, JR., PERCY S. HARTZELL, JAMES J. SULLIVAN, HENRY J. GRANT, BRYNMOR DAVIS, JR., WILLIAM H. YOST, RUSSELL PARKHOUSE, FRANKLIN JENKINS, AND DANIEL COSTELLO

DOLORES BRENNAN,
Appellant in No. 71-1503

ANNE E. LONERMAN,
Appellant in No. 71-1504

WILLIAM JONES,
Appellant in No. 71-1505

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Argued December 1, 1971.

Before SEITZ, *Chief Judge*, KALODNER and GIBBONS, *Circuit Judges*.

OPINION OF THE COURT OF APPEALS.

(Filed February 11, 1972.)

PER CURIAM:

This is an appeal from an order of a single judge of the district court dismissing appellants' complaint with prejudice. The complaint, invoking jurisdiction under 42 U. S. C. § 1983, asserts that a Pennsylvania statute violates the Fourteenth Amendment.

The facts focus on the election procedures applicable to filling vacancies on the Board of Commissioners of Abington Township, Pennsylvania. Abington, a township of the First Class, is governed by a board of fifteen commissioners. Under the First Class Township Code [1] one commissioner is elected from each of the fifteen Abington ward districts. In the 1969 municipal elections Hugh O'Neill was elected commissioner of the Eighth Ward. He later resigned. In accordance with the provision of the Code governing vacancies [2] the fourteen remaining board members, among themselves, then elected Brynmor Davis, Jr. to fill Mr. O'Neill's unexpired term. Mr. Davis was a resident of the Eighth Ward as the law required.

Appellants are registered voters of the Eighth Ward who had voted for O'Neill in the 1969 election. Subsequent to the filing of their complaint they requested that a three-judge court be convened pursuant to 28 U. S. C. §§ 2281, 2284. The single judge district court recommended to then Chief Judge Hastie that such a court be convened. Judge Hastie refused for the reason that "the [appellants'] formal challenge to the constitutionality of [the] state statute [was] not such as to warrant the convening of a

1. Act of June 24, 1931, P. L. 1206 § 504, as amended, 53 P. S. § 55504.

2. Act of April 27, 1967, P. L. 9 § 1, 53 P. S. § 55530.

Three Judge Court." The district court thereafter dismissed the complaint and this appeal followed.

No opinion accompanied the district court's order. However, we think it clear that the district court concluded, in view of Judge Hastie's reasoning, that the complaint failed to state a claim under the equal protection clause. It, therefore, dismissed the complaint on its own motion.

The appellants' complaint attacks the constitutionality of statutory procedures for filling vacancies in First Class township boards. Under those procedures the board members in office effect a consensus appointment to their membership of a resident of the district where the vacancy exists. It is true that this procedure acts to deny the citizens of the ward faced with a vacancy any role in the selection of a replacement representative. The new commissioner is the choice solely of those commissioners remaining on the board when the vacancy is filled. None of these individuals was elected by the vote of the electorate of the ward where the vacancy exists. Although there is a potential for unfairness in this situation, we do not think it reaches federal constitutional proportions.

Appellants contend that the failure of the vacancy procedures to assure them a voice in the selection of an interim commissioner poses a substantial constitutional question. See Miller v. Smith, 236 F. Supp. 927, 930 (E. D. Pa. 1964). However, it is fairly well established that the right of a specific electorate to vote for state government officials does not of itself establish in that same electorate the right to fill those positions in the event of interim vacancies. As noted by the recent three-judge court decision in Kaelin v. Warden, F. Supp. , (E. D. Pa. 1971):

> "The use of an appointive process as a means to fill an interim vacancy is not foreign to our traditional notions of representative government. In fact, an ap-

> pointive procedure is specifically condoned by the Seventeenth Amendment in order to fill vacancies in the United States Senate. A compelling state interest is furthered by the use of an interim appointment as a stop-gap measure designed to avoid delay in the discharge of public business. . . . (citations omitted)."

Compare Burns v. Richardson, 384 U. S. 73, 90-97 (1966) with Kramer v. Union Sch. Dist., 395 U. S. 621, 632 (1969).

The reasoning in Kaelin sustains the procedures here challenged. As was true in that case these procedures provide for the orderly administration of the township without the possible hiatus in governmental operations necessarily consequent to replacement of a commissioner by resort to public election. Here, too, the preservation of a legitimate state objective is furthered in an area in which the state has a compelling interest, i.e., uninterrupted township government. See — F. Supp. at —. *See also* Abate v. Mundt, 403 U. S. 182 (1971); Turner v. Fouche, 396 U. S. 346, 361 (1970).

The order of the district court will be affirmed.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

Nos. 71-1503/4/5.

DOLORES BRENNAN, ANNE E. LONERMAN AND WILLIAM JONES

v.

GEORGE R. HAINES, MAX M. SOLOMON, EDWARD M. REILLY, GEORGE F. SHUSTER, WILLIAM D. C. DENNIS, DENNIS P. DOUGHERTY, RUSSELL S. DETWEILLER, FRED W. GENTER, RICHARD Z. KINARD, HORACE F. RICHTER, JR., BERNARD J. ENRIGHT, JR., PERCY S. HARTZELL, JAMES J. SULLIVAN, HENRY J. GRANT, BRYNMOR DAVIS, JR., WILLIAM H. YOST, RUSSELL PARKHOUSE, FRANKLIN JENKINS, AND DANIEL COSTELLO,

DOLORES BRENNAN, APPELLANT IN No. 71-1503,
ANNE E. LONERMAN, APPELLANT IN No. 71-1504,
WILLIAM JONES, APPELLANT IN No. 71-1505.

(D. C. Civil Action No. 70-3144).

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Present: SEITZ, *Chief Judge* and KALODNER and GIBBONS, *Circuit Judges.*

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed April 28, 1971, be, and the same is hereby affirmed, with costs taxed against appellants.

ATTEST:

THOMAS F. QUINN,
Clerk.

February 11, 1972.

Costs taxed in favor of appellees as follows:
Brief for appellees $169.34

Certified as a true copy and issued in lieu of a formal mandate on March 6, 1972.

Test:

THOMAS F. QUINN,
Clerk, United States Court of Appeals for the Third Circuit.

ACT OF APRIL 27, 1967, P. L. No. 9, § 1 (53 P. S. § 55530).

When a vacancy occurs in the office of township commissioner in any township, by reason of death, resignation, removal from the township or ward, or otherwise, the board of township commissioners of such township shall fill such vacancy by appointing by resolution a registered voter of the ward or township, as the case may be, in which the vacancy occurs. If the board of township commissioners of any township shall refuse, fail, or neglect, or be unable for any reason whatsoever, to fill such vacancy within thirty (30) days after the vacancy occurs, then the court of quarter sessions shall upon the petition of twenty registered voters of the ward or township, as the case may be, in which the vacancy occurs appoint a registered voter of the township to fill the vacancy. In either event, the person so appointed shall have been a resident of the township continuously for at least one (1) year before his appointment and shall hold office for the unexpired term of the person whose place he is appointed to fill. In townships divided into wards, a commissioner appointed by either the board of commissioners or the court of quarter sessions shall reside in the ward in which the vacancy occurred and shall have resided in said ward continuously for at least one (1) year before his appointment.

THREE-JUDGE COURT ACT.

28 U. S. C. § 2281.

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement, or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title. June 25, 1948, c. 646, 62 Stat. 968.

SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

October Term, 1971

No. 71-1454

Supreme Court, U. S.
FILED
JUN 5 1972
MICHAEL RODAK, JR., CLERK

DOLORES BRENNAN and
ANNE E. LONERMAN and
WILLIAM JONES,

Petitioners

v.

GEORGE R. HAINES, et al.,

Respondents

BRIEF FOR RESPONDENTS

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THE LEGAL INTELLIGENCER, 66 NORTH JUNIPER STREET, PHILA., PA. 19107

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QUESTIONS PRESENTED

1. Does the filling of a vacancy, as required by state law, for an unexpired term on a municipal legislative body by the other legislators of that body who were elected by wards constitute such a substantial question of denial of equal protection of law of electors in the ward from which the legislator who resigned to create the vacancy was elected under the Fourteenth Amendment to the Constitution as to require the convening of a three-judge court under 28 U.S.C. 2281 et seq.?

2. If a circuit court of appeals determines that a district court erred in not convening a three-judge court under 28 U.S.C. 2281 et seq., does the circuit court have the authority to bypass the three-judge court and decide the case on its merits?

STATEMENT OF THE CASE

Brynmor Davis, Jr., who was elected by the fourteen members of the Board of Commissioners to fill Mr. O'Neill's unexpired term as Commissioner of the Eighth Ward, was a resident of the Eighth Ward as the law required (A4).

REASONS FOR REFUSING THE WRIT

1. The Court of Appeals did not err in declining to order the convening of a three-judge court since the case does not involve a substantial federal constitutional question.

The key issue in this case is whether petitioners satisfied the requirement for the convening of a three-judge court that the case involves a substantial federal constitutional question. The law on this point was recently set forth by Chief Judge Phillips of the United States Court of Appeals for the Sixth Circuit in *Jones et al. v. Branigin et al.*, 433 F.2d 576 (6th Cir. 1970) at page 577:

> "The statutes providing for three-judge courts were designed to secure the public interest in a 'limited class of cases of special importance.' *Phillips v. U.S.*, supra, 312 U.S. at 249; *Ex parte Collins*, 277 U.S. 565, 567. These statutes therefore have been strictly construed. *Mitchell v. Donovan*, 398 U.S. 427; *Rosado v. Wyman*, 397 U.S. 397; *Goldstein v. Cox*, 396 U.S. 471, *Phillips v. U.S.*, supra, 312 U.S. 246.
>
> "As said in *Allen v. State Board of Elections*, 393 U.S. 544, 561:
>
> > 'We have long held that congressional enactments providing for the convening of three-judge courts must be strictly construed . . . convening a three-judge court places a burden on our federal court system, and may often result in a delay in a matter needing swift initial adjudication. . . . Thus we have been reluctant to extend the range of cases necessitating the convening of three-judge courts.'
>
> "In *Swift & Co. v. Wickham*, 382 U.S. 111, 115, the Supreme Court said: 'It has long been held that no such court is called for when the alleged constitutional claim is insubstantial.' To like effect see *Booker*

v. State of Tennessee Board of Education, 240 F.2d 689, 691 (6th Cir.), motion for leave to file petition for writ of mandamus denied, 351 U.S. 948.

"In *Ex parte Poresky*, 290 U.S. 30, 31, the Supreme Court said that 'a substantial claim of unconstitutionality' is necessary for the convening of a three-judge court, and that the statute 'does not require three judges to pass upon this initial question of jurisdiction.'"

To determine whether there has been such a substantial claim of unconstitutionality, it is necessary to examine the allegations of the complaint in question. In their complaint the petitioners claim that they have been denied the equal protection of the law under the Fourteenth Amendment because none of the commissioners who appointed Mr. Davis to fill the vacancy were residents of the 8th Ward and because the petitioners who are residents of the 8th Ward had not been able to participate in the election of any of them. The case relied upon by petitioners is *Avery v. Midland County*, 390 U.S. 474 (1968). Mr. Justice White in the opinion for the Court in that case stated at pages 484-485:

"The Equal Protection Clause does not, of course, require that the State never distinguish between citizens, but only that the distinctions that are made not be arbitrary or invidious. The conclusion of *Reynolds v. Sims* was that bases other than population were not acceptable grounds for distinguishing among citizens when determining the size of districts used to elect members of state legislatures. We hold today only that the Constitution permits no substantial variation from equal population in drawing districts for units of local government having general governmental powers over the entire geographic area served by the body.

"This Court is aware of the immense pressures facing units of local government, and of the greatly

varying problems with which they must deal. The Constitution does not require that a uniform straitjacket bind citizens in devising mechanisms of local government suitable for local needs and efficient in solving local problems. Last Term, for example, the Court upheld a procedure for choosing a school board that placed the selection with school boards of component districts even though the component boards had equal votes and served unequal populations. *Sailors v. Board of Education*, 387 US 105, 18 L Ed 2d 650, 87 S Ct 1549 (1967). The Court rested on the administrative nature of the area school board's functions and the essentially appointive form of the scheme employed. In *Dusch v. Davis*, 387 US 112, 18 L Ed 2d 656, 87 S Ct 1554 (1967), the Court permitted Virginia Beach to choose its legislative body by a scheme that included at-large voting for candidates, some of whom had to be residents of particular districts, even though the residence districts varied widely in population."

Oregon v. Mitchell, 400 U.S. 112 (1970), was a landmark decision of the Court in voting cases. In that case the Supreme Court by a 5-to-4 decision determined that the Voting Rights Act Amendments of 1970, which were enacted by Congress, were unconstitutional insofar as Congress attempted to lower the voting age to 18 for voters in state and local elections. Mr. Justice Black, who also voted with the majority in approving the validity of the act insofar as it lowered the age for voters to 18 in federal elections, stated at page 124:

"On the other hand, the Constitution was also intended to preserve to the States the power that even the Colonies had to establish and maintain their own separate and independent governments, except insofar as the Constitution itself commands otherwise. My Brother Harlan has persuasively demonstrated that the Framers of the Constitution in-

> tended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections. My major disagreement with my Brother Harlan is that, while I agree as to the States' power to regulate the elections of their own officials, I believe, contrary to his view, that Congress has the final authority over federal elections. No function is more essential to the separate and independent existence of the States and their governments than the power to determine within the limits of the Constitution the qualifications of their own voters for state, county, and municipal offices and *the nature of their own machinery for filling local public offices.*" (Emphasis supplied)

Mr. Justice Stewart, with whom Chief Justice Burger and Mr. Justice Blackmun joined, concurring in part and dissenting in part, stated at pages 293-4:

> "Mr. Justice Black is surely correct when he writes, 'It is a plain fact of history that the Framers never imagined that the national Congress would set the qualifications for voters in every election from President to local constable or village alderman. It is obvious that the whole Constitution reserves to the States the power to set voter qualifications in state and local elections, except to the limited extent that the people through constitutional amendments have specifically narrowed the powers of the States.' *Ante* at 125."

It is necessary then to determine whether the residents of Ward 8 have some inherent right to be represented by a commissioner whom they elect. It is very clear that the petitioners have cited no basis for such right in Pennsylvania law. It is also very clear that the petitioners and other electors of Ward 8 have no inherent right to hold an election. The law on this subject is well summarized in 29 C.J.S. *Elections* §66:

"In all popular forms of government the power of a majority to bind the minority by a popular vote depends on the fact that the elections are held by virtue of some legal authority. There is no inherent right or power in the people to hold an election, and the system of elections in this country is not of common-law origin, since it was unknown to the common law.

"The right or power to hold an election must be based on authority conferred by law, and an election held without affirmative constitutional or statutory authority, or contrary to a material provision of the law, is universally recognized as being a nullity, even though it is fairly and honestly conducted. . . .

"The authority to hold an election is legislative and political. The legislature may provide for elections, both general and special, as long as they do not conflict with constitutional requirements, and, except in so far as constitutional provision is made for an election, the legislature alone has authority to provide for an election."

Several recent decisions by federal courts have emphasized the fact that the right to vote in state elections is a privilege granted by the state. As the court stated in *Fontham v. McKeithen*, 336 F.Supp. 153 (E.D. Louisiana, 1971), at page 155:

"[2] The underlying concept in this case is that a resident of a State does not have a *right* to vote in State elections; there is no inherent right to vote, but a *privilege* to vote, which privilege is granted by the State and is not derived from citizenship of the United States, nor granted by the federal Constitution or any of its Amendments. Minor v. Happersett, 21 Wall. 162, 22 L.Ed. 627 (1875)."

Similarly, the court stated in a Per Curiam opinion in *Pate v. El Paso County, Texas*, 337 F.Supp. 95 (W.D. Texas, 1970), at page 97:

"The right to vote is a privilege to be exercised as the state may direct, and upon such terms as may seem proper to the state, provided there is no discrimination between individuals in violation of the equal protection afforded by the United States Constitution. As long as standards and conditions regarding voting are reasonable and non-discriminatory they are permissible. Carrington v. Rash, 380 U.S. 89, 85 S.Ct. 775, 13 L.Ed.2d 675 (1965); Lassiter v. Northampton County Board of Elections, 360 U.S. 45, 79 S.Ct. 985, 3 L.Ed.2d 1072 (1959); Pope v. Williams, 193 U.S. 621, 24 S.Ct. 573, 48 L.Ed. 817 (1904)."

The argument is made by petitioners that since they were given the right to vote for their commissioner, they have the right to vote to fill his vacancy. As we have seen, such is not the case unless the legislature saw fit to give them such right, which it has not done.

The same procedure for filling vacancies applies to all first class townships in the Commonwealth. The commissioner elected from petitioners' ward had the same right to participate in the appointment of a commissioner to fill an unexpired term for any other ward as the other commissioners had to fill the vacancy in question. The relationship between the ward and the municipality was clearly explained in a case involving a similar procedure which was decided by the Supreme Court of Errors of Connecticut in *State v. Waterman*, 111 A. 623 (1920), in which the Court stated at page 624:

"[1] For the purposes of candidacy and election an alderman elected from a single ward may be described as a ward officer or ward alderman; but after election and in the exercise of his office a ward alderman is as much a city officer as is an alderman at large. The wards have no separate legislative powers. In their relation to the court of common council they are but election districts. The common council consists of city officers in the same sense that

our Senate consists of state officers, though elected from senatorial districts."

The court went on to point out that to permit the municipal legislative body to fill the vacancy of a legislator elected from a single ward would not violate the principles of representative government at pages 624-625:

> "[2] The argument seems to be that, because the General Assembly cannot fill vacancies in its own ranks by resolution, it cannot authorize the legislative body of a chartered municipal corporation to do so. This is a non sequitur. The authority which creates an office may direct how any vacancies therein shall be filled. The General Assembly cannot fill vacancies in the House or Senate, because the offices of Senator and Representative were created by the people in convention assembled; and that authority has not granted to the General Assembly any power of filling vacancies in its ranks, except in the case of a tie vote. On the other hand, the office of alderman from the Sixth ward of the city of Hartford as well as the privilege of voting for such an alderman, was created by the General Assembly, which may therefore direct any vacancy therein to be filled by the court of common council without depriving the electors of the Sixth ward of any constitutional or fundamental right."

The Supreme Court ot the United States has recognized that the states may work out practical procedures short of requiring that once a state gives the electorate the right to vote for a particular office, it must always do so every time that office is to be filled. In *Fortson v. Morris*, 385 U.S. 231 (1966), the Supreme Court approved a provision of the Georgia Constitution that if no candidate for governor received a majority of votes in a general election, then the Georgia Legislature should elect the governor from the two persons having the highest number of votes.

In the instant case the filling of the vacancy runs for a limited time, namely, three and one-half years. In no case

could it run for more than four years, which is the term of office: Act of May 27, 1955, P. L. 1955, Section 12, 53 P.S. §55504. The fact that the Supreme Court recognizes that the Equal Protection Clause cannot practicably be applied on a continuing basis was shown by Chief Justice Warren in the Court's opinion in *Reynolds v. Sims*, 377 U.S. 533 (1964) at pages 583-584:

> "In substance, we do not regard the Equal Protection Clause as requiring daily, monthly, annual or biennial reapportionment, so long as a State has a reasonably conceived plan for periodic readjustment of legislative representation. While we do not intend to indicate that decennial reapportionment is a constitutional requisite, compliance with such an approach would clearly meet the minimal requirements for maintaining a reasonably current scheme of legislative representation."

Several recent federal decisions have held that the denial of the right to vote for periods of six years' duration did not offend the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. In *Ferrell v. State of Oklahoma ex rel. Hall*, 339 F.Supp. 73 (W.D. Oklahoma, 1972), at page 82 the court stated:

> "Plaintiffs claim that it is invidiously discriminatory for the State Legislature to provide that citizens living in certain geographic areas of the State of Oklahoma, who last voted for a Senator in 1968, and who will next vote for a Senator in 1974, is untenable. During the two year transitional period in changing from the court-ordered apportionment plan of 1964 to the constitutional apportionment plan of 1972, such situations are unavoidable if four year overlapping terms are to be provided as required by the State Constitution—and to do so does not offend the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. Stout v. Bottorff, 249 F.Supp. 488 (D.C. Ind. 1965); Rey-

nolds v. State Election Board, 233 F.Supp. 323 (W.D. Okl. 1964)."

Similarly, in *Pate v. El Paso County, Texas*, supra, the court held that a provision of the Texas Constitution establishing staggered terms for county commissioners did not effectuate unconstitutional denial of right to vote in violation of equal protection and due process requirements of the United States Constitution, either on its face or as applied to voters who would have been entitled to vote for county commissioner at the next election but who, because of redistricting, were transferred to districts in which they would not be entitled to vote for county commissioner until the second following election.

An analogous case to the case in question is *Anderson v. Meisser*, 285 F.Supp. 974 (E.D. New York 1968). In that case plaintiff urged that it was a violation of the right of "one-man, one-vote" of persons in one of a number of districts within a county to permit a county-wide committee to determine who can run for office in the district. The court recognized that the standards of the Equal Protection Clause apply to party primaries as well as to general elections. The court then went on to state at pages 975-976:

> "We need not now decide whether greater leeway in departing from equivalence of voting power is permitted in party contests, for the Supreme Court has refused to expand the rule of *Reynolds v. Sims*, 377 U.S. 533, 84 S. Ct. 1362, 12 L.Ed.2d 506 (1964) to outlaw the subtle attenuation of equality involved in cases such as this. See, e.g., *Dusch v. Davis*, 387 U.S. 112, 87 S.Ct. 1554, 18 L.Ed.2d 656 (1967) (voters from entire city elected candidates required to live in districts of unequal population); *Fortson v. Dorsey*, 379 U.S. 433, 85 S.Ct. 498, 13 L.Ed.2d 401 (1965) (multi-member and single member districts). While members of a party living outside the voting district are granted some control over candidates

> within the district, party members within the district exercise power in districts other than their own. Thus the loss of a single party member's influence in his district by diffusion of power over the larger area of a county is at least partly offset by the increased sway he gains in other districts. The Constitution does not require that these gains and losses offset each other with the mathematical nicety of an accountant's balance sheet. But cf. Banzhaf III, *Multimember Electoral Districts—Do They Violate the 'One Man, One Vote' Principle*, 75 YALE L.J. 1309 (1966). The federal question raised by plaintiff is frivolous."

This is very similar to the case in question. When the voters of Ward 8 voted for the commissioner from their ward, they were given powers beyond their ward because their commissioner became a commissioner of the entire township and he thereby had the right to participate in the appointment of any commissioner to fill any vacancy from any other ward. The fact that the commissioner from Ward 8 later resigned his office was happenstance.

The cases cited by petitioners in their petition in support of the proposition that this case presents a substantial constitutional question are easily distinguishable. One case does not involve voters' rights at all. In every other case cited by petitioners the state statute or constitution in question authorized the election about which the plaintiff was complaining except *Kaelin v. Warden*, 334 F.Supp. 598 (E.D. Pa. 1971), and it should be noted that the United States Court of Appeals for the Third Circuit relied heavily on *Kaelin v. Warden*, 334 F.Supp. 602 (E.D. Pa. 1971) in affirming the lower court's decision in this case to deny petitioners' request for the convening of a three-judge court.

We can see then that the petitioners have not established that there is a substantial federal question involved in this case. The law is now clear that the states have the

power to determine "the nature of their machinery for filling local public offices" *Oregon v. Mitchell*, supra. The only claimed basis for federal jurisdiction in this case is the Equal Protection Clause of the Fourteenth Amendment. Since there is no inherent right to vote to fill the vacancy in the office of township commissioner, the petitioners cannot complain to the federal government if the state does not so provide. Further, the commissioner petitioners had an opportunity to vote for when elected had the same opportunity to participate in the filling of any other vacancy in the office of township commissioner as the other commissioners did in the case of his vacancy.

2. If this Court determines that a three-judge court should have been empaneled, it cannot bypass that procedure.

Petitioners contend that the Court of Appeals erred in not deciding this case on the merits. No authority for this proposition of law is cited and indeed none can be because there is no such authority. The main thrust of petitioners' argument is that since the next election for commissioner from the Eighth Ward is scheduled for November, 1973, petitioners' case will become moot if it is not now decided on the merits. This is inherent in petitioners' case and indeed is one indication of the fact that no substantial federal constitutional question is involved in this matter.

Regardless of the passage of time even if the Court of Appeals had determined that a three-judge court should have been empaneled by the District Court, the Court of Appeals had no authority to decide the case on its merits.

As the court said in *Idlewild Liquor Corp. v. Epstein*, 370 U.S. 713 (1962) at 715-716 in a Per Curiam opinion:

> "In the Stratton Case[1] it was held that a court of appeals was precluded from reviewing on the merits a case which should have originally been determined by a court of three judges."

1. *Stratton v. St. Louis S. W. R. Co.*, 282 US 10 (1930).

The Per Curiam opinion of the U. S. Court of Appeals for the Fifth Circuit in *Gong v. Kirk*, 375 F.2d 729 (5th Cir. 1967) which was cited by petitioners on page 9 of their petition, recognized this principle.

The authority for the issuance of an injunction against enforcement of a state statute on the ground that it is unconstitutional is statutory as set forth in 28 U.S.C. §2281, which requires a hearing and a determination by a district court of three judges. Accordingly, even if this Court were to decide that petitioners had presented a case which involved a substantial federal constitutional question, the only authority this court would have would be to direct the District Court to convene a three-judge court. There is no authority for the Circuit Court of Appeals to decide such a case on its merits. Similarly, there is no authority for this court to decide such a case on its merits in the first instance unless, of course, this Court otherwise had original jurisdiction of the case which is not true of the present case.

CONCLUSION

Petitioners have not shown that a substantial constitutional question is involved in their challenge of the constitutionality of the state statute governing the filling of a vacancy on the board of commissioners of a first class township. Therefore, the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit should be denied.

Respectfully submitted,

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